No. 04-518

IN THE
Supreme Court of the United States

H&R BLOCK, INC. *et al.*,

Petitioners,

v.

LYNNE A. CARNEGIE, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondent,

v.

HOUSEHOLD INTERNATIONAL, INC., HOUSEHOLD BANK F.S.B. SUCCESSOR IN INTEREST TO BENEFICIAL NATIONAL BANK, HOUSEHOLD TAX MASTERS, INC. FORMERLY KNOWN AS BENEFICIAL TAX MASTERS, INC., BENEFICIAL FRANCHISE COMPANY, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

HOUSEHOLD RESPONDENTS' BRIEF IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether a defendant who has agreed to settle a putative class action lawsuit may, if the settlement is later rejected by a court, raise concerns about compliance with Rule 23's requirements for class certification even if the defendant did not previously identify those concerns during the class settlement approval proceedings.

2. Whether in applying the predominance requirement under Rule 23(b)(3) in a putative class action case premised on mail or wire fraud under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, the court should ignore the fact that each class member must individually prove reliance.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Household International, Inc., Household Tax Masters, Inc. and Beneficial Franchise Company Company, Inc. are indirect wholly-owned subsidiaries of HSBC Holdings plc, a United Kingdom corporation, and no public company holds 10% or more of its stock. HSBC Holdings' shares are traded in the United States as American Depository Shares on the New York Stock Exchange.

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Household International, Inc., Household Bank, f.s.b., Household Tax Masters, Inc. and Beneficial Franchise Company, Inc. (collectively "the Beneficial Respondents") respectfully submit this Brief in Support of the Petitioners. In a decision involving a legal issue "whose prompt resolution is important to the development of the law of class actions," Pet. App. 2a, a respected jurist in the Seventh Circuit has adopted

a rule that threatens substantially to chill the settlement of class litigation. The potentially crushing impact of class litigation on defendants is well recognized. Defendants who have substantial grounds to dispute class certification nonetheless often prefer to settle class litigation early. The decision below treats such a decision as a binding admission that all the class certification requirements of Rule 23 have been met (except for trial manageability concerns), even if the class settlement is later rejected by a court. That ruling merits the review of this Court because of its potential to distort and hinder the important public policy of encouraging the early settlement of cases that often are a great drain on scarce judicial resources.

In addition, the decision below created a conflict of authority regarding how to apply Rule 23(b)'s predominance requirement in the frequently litigated context of RICO claims based on mail and wire fraud. Several courts have recognized that such claims fail to present common issues that predominate over the individualized issues of reliance that must be proved, class member-by-class member, before liability can be found. Only this Court can provide uniformity to the now broadly divergent approahes taken by the courts of appeals.

STATEMENT OF THE CASE

In light of the well presented statement of the case in the Petition, and to avoid a repetitious burden on this Court, the Beneficial Respondents will set forth only an abbreviated statement of their own.

A. Background

As indicated in the Petition, one of the Beneficial Respondents, Household Bank, f.s.b., is the lender on the Refund Anticipation Loans ("RALs") at issue in this case. RALs provide income tax filers an opportunity to receive the anticipated value of their tax refund in cash faster than they

would if they waited for the IRS to process their income tax return and cut and mail a check. Beneficial extends a loan to the taxpayer in an amount of the anticipated refund at the time the taxpayer files his or her tax forms, and the loan is secured by the borrower's expected refund from the government. At present, the plaintiff is asserting class claims on behalf of herself and other RAL borrowers based on RICO and breach of contract.

The defendants below reached a settlement agreement with the original named defendants and proposed class counsel in October 1999. As Petitioners have noted, the settlement agreement included a provision expressly reserving *all* rights, including the right to contest class certification, if the settlementdid not receive judicial approval. Pet. 4.

The district court approved the settlement. The district judge placed on the record all the findings necessary to support certification of the class as it existed at that time for the limited purpose of settlement. Included within those findings, was a statement that common questions of fact or law "predominate over any questions affecting only individual members for the purpose of effectuating a settlement." This predominance finding was not only tethered to the settlement posture in which the issue was presented to the district court at that time, but it was also unconnected to any particular common question or claim. Thus, nowhere in the record of the settlement approval proceedings is there any finding that there exist common questions of law or fact that predominate with respect to the RICO or breach of contract claims that are currently before the Court.

Respondent Lynne Carnegie appeared during the settlement proceedings and challenged the adequacy of the class's representation and the fairness of the settlement. The district court rejected her challenge, and approved the settlement.

Carnegie appealed and the Seventh Circuit reversed. The Seventh Circuit concluded that the class had not been adequately represented in the proceedings, and that the record did not provide sufficient information to evaluate conclusively its fairness. The case was remanded and reassigned to a new district judge.

On remand, the district court rejected the settlement. The district court concluded not only that the record failed to provide sufficient information to evaluate whether the settlement was fair and adequate, but also that the named plaintiffs and their class counsel should be removed. After expressing some uncertainty about "procedurally the best way to proceed" with the class issues, the district court substituted Carnegie as named plaintiff, and permitted her to file a second amended complaint.

The new complaint added seven new defendants, none of whom had participated in any of the proceedings up to this point, including the prior class settlement proceedings. The new complaint also added new claims. Carnegie did not, however, file a motion to certify a class. Nonetheless, the district court ordered the parties to brief class certification issues raised by the second amended complaint.

The defendants below argued that Carnegie had to file a motion for class certification because the previous class, which had been certified for litigation purposes only, had ceased to exist. The district court never required such a motion, and the issue was analyzed as if the defendants carried the burden to *decertify* an existing class.

On the merits of the question, the defendants argued, *inter alia*, that the RICO claims should not be litigated on a class basis because each individual plaintiff would be required to prove that he or she relied on the alleged misrepresentations before liability could be determined. Defendants thus argued that individual issues predominated over common issues with respect to the RICO claim. In addition, the defendants

argued, based on Seventh Circuit precedent, see *In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation*, 333 F.3d 763 (7th Cir. 2003), that the plaintiff was precluded by collateral estoppel from seeking certification of a RICO class based on the challenged RAL practices because a federal district court in Georgia had already considered and rejected a motion to certify such a class for litigation purposes, see *Buford* v. *H&R Block, Inc.*, 168 F.R.D. 340 (S.D. Ga. 1996), *aff'd*, 117 F.3d 1433 (11th Cir. 1997) (table).

The district court allowed the claims at issue here to proceed on a classwide basis. The district court's ruling did not confront defendants' predominance argument. Pet. App. 20a-21a. With respect to the collateral estoppel argument, the district court deemed it waived because the defendants had not called the *Buford* decision, and its potential collateral estoppel effect, to the attention of either the district court or the Seventh Circuit when both courts were considering whether to approve the settlement. The defendants sought discretionary review in the Seventh Circuit pursuant to Rule 23(f).

B. The Opinion Below

The Seventh Circuit acknowledged the importance of the issues presented in the petitions to appeal "to the development of the law of class actions" and therefore granted the petitions. Pet. App. 2a. However, despite the defendants' express request for the opportunity to brief fully the issues, the court of appeals deemed the issues "fully briefed" on the basis of the petitions and responses thereto alone and ruled on the merits. *Id.*

The court of appeals concluded that the doctrine of judicial estoppel bars a defendant from objecting to class certification for litigation purposes on any ground except manageability when the parties have previously obtained a district court order approving class certification for settlement purposes only, even if the settlement is later rejected on appeal.

According to the court, the doctrine of judicial estoppel is designed to prevent a party from obtaining a favorable ruling in a lawsuit based on some ground and then turning around and repudiating that ground thereafter. Pet. App. 5a-6a. The court, ruling solely on the basis of the petitions and the responses thereto, perceived that this policy was implicated here on the basis of nothing more than the defendants' ability to persuade the original district judge to certify the case as a class for settlement purposes only. The court of appeals did not and could not identify anything in the district court's (now overruled) ruling certifying the class for settlement purposes that demonstrated that the defendants had persuaded the district court that common issues predominated over individual issues with respect to the new RICO claims.

Likewise, the court of appeals concluded that the defendants' collateral estoppel argument against class certification need not be considered on the merits. Pet. App. 11a. The court acknowledged that *Buford* had concluded that individual issues predominated over common issues with respect to the plaintiff's RICO claims. *Id.* at 10a. But the defendants' failure to raise *Buford* as a ground for rejecting class certification for settlement purposes precluded them from raising it as a defense to class certification for litigation purposes now that the settlement was rejected. The court of appeals did not conclude, or even consider, whether the predominance problem with respect to the RICO claims would have been a reason to reject certification of the class for settlement purposes given that the class had asserted, and the settlement had covered, a variety of legal causes of action beyond RICO. The failure to consider this issue was conspicuous because the Beneficial Respondents had raised it in their petition.

The court of appeals did consider and reject the manageability arguments raised by the defendants. The principal argument against manageability was closely related to the predominance argument. Because each individual class

member would be required to prove that he or she actually relied on an alleged false statement before establishing liability, the defendants argued that the litigation could not be efficiently managed on a class basis. The court acknowledged that, for these reasons, the Fifth Circuit has determined that, with respect to RICO claims based on mail and wire fraud, individual issues presumptively predominate over common issues. Pet. App. 10a (citing *Sandwich Chef of Texas, Inc.* v. *Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 219 (5th Cir. 2003), *cert. denied*, 124 S. Ct. 101 (2003)).

The court was "dubious" of the Fifth Circuit's approach. The court first defined away the manageability/predominance problem. Rather than treat reliance as an element of liability for plaintiffs' claims, the court treated it as an "injury" or a "damages" issue that could be "separated from the question whether" RICO was violated. Pet. App. 10a; see also *id.* at 7a. The court opined that the district court might employ "imaginative" procedures to deal with the individual issues once liability (narrowly defined to exclude reliance) was determined on a class basis.

In addition, the court assumed away the manageability/predominance problem. The difficulty of litigating individual issues of reliance, according to the court, need not preclude class treatment because if the court determines that all class members who did rely are entitled to recover, "a global settlement along the lines originally negotiated ... will be a natural and probable sequel." Pet. App. 7a. In other words, the class can be certified for litigation purposes because the defendants will likely be compelled to settle.

REASONS FOR GRANTING THE PETITION

The decision below threatens settled litigation practices that enhance the orderly administration of class action litigation under Rule 23. First, the Seventh Circuit's application of judicial estoppel to preclude a settling defendant from

disputing class certification in the event the settlement is ultimately rejected is unwarranted and unwise. It is unwarranted because it radically extends the doctrine of judicial estoppel to cases where a prior position was not "clearly inconsistent" with the earlier position, contrary to this Court's decision in *New Hampshire* v. *Maine*, 532 U.S. 742, 750 (2001). It is unwise because class settlements are often reached at an early stage of the litigation, before the court has had an opportunity authoritatively to determine whether class certification is appropriate. As a result, a defendant agreeing to a class settlement often will have substantial, but uncertain, grounds to doubt the propriety of class treatment under Rule 23. But owing to the substantial cost and risk of defending class litigation, defendants often agree to settle a case on a class basis. This spares the courts and litigants significant time and expense. If later rejection of the settlement nevertheless burdens the defendant with class certification, then this a powerful disincentive to settle these disputes with a corresponding drain on scarce judicial resources.

Second, the Seventh Circuit's analysis of the application of the predominance/manageability standard for class certification to RICO fraud cases conflicts with the approach of the Fifth Circuit, as well as the Ninth, Eleventh, and Fourth Circuits and, if accepted, has the potential to undermine Rule 23's critical requirement that common issues predominate over individual issues in class cases. In an analysis that runs contrary to that of every other court of appeals to have ruled on the matter, the Seventh Circuit has concluded that individual issues of reliance in a fraud case go to remedy, and are not part of the liability determination, and hence can be ignored when determining whether to allow a *portion* of the case to proceed on a class basis. This piecemeal approach to litigation, where some of the elements of a claim are litigated on a class basis, while others, if necessary, are litigated individually, threatens to impose a heavy burden on courts in

precisely the way that Rule 23's predominance requirement was designed to prevent.

I. A DEFENDANT WHO OBTAINS APPROVAL OF A CLASS ACTION SETTLEMENT SHOULD NOT BE BOUND FROM OBJECTING TO CLASS TREATMENT OF ANY CLAIMS IF THE SETTLEMENT IS REJECTED.

This Court has made clear that the doctrine of judicial estoppel should not apply unless "a party's later position ... [is] 'clearly inconsistent' with its earlier position." *New Hampshire*, 532 U.S. at 750. The Seventh Circuit concluded that permitting the defendants here to dispute the plaintiff's implicit assertion that common issues predominate over individual issues with respect to the RICO fraud claims would be "clearly inconsistent" with the defendants' earlier position that the RICO fraud claims could be included within classwide settlement agreement. That conclusion contains an implicit, and controversial, assumption: to include the RICO fraud claims within the scope of the settlement agreement, the defendants were then necessarily claiming that the RICO fraud claims were appropriate for class treatment, even though the complaint had asserted claims under a variety of legal theories. This Court should accept review to clarify whether a defendant who agrees to settle putative class litigation on a classwide basis necessarily is asserting that Rule 23's requirements for class certification have been met with respect to each and every claim asserted in the complaint and inlcuded within the scope of the settlement so that if the settlement is later rejected, and certifying a litigation class is considered, the defendant should be estopped from denying that those requirements (except for trial management concerns) have been met.

This Court has made clear that, with the exception of trial management concerns, the requirements of Rule 23 are as applicable in the settlement context as they are in the litigation context. *Amchem Prods., Inc.* v. *Windsor*, 521 U.S.

591, 620 (1997). Therefore, to certify a class for settlement purposes, the district court was required to conclude that each of Rule 23's requirements, including the predominance of common issues over individual issues, had been satisfied. But because the parties were settling their claims, the district court was not required to conclude that Rule 23's requirements had been met with respect to each claim that was included within the scope of the settlement.

The overriding purpose of Rule 23's requirements for class certification is to ensure that "a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives." *Id.* at 621. At bottom, Rule 23 works to ensure that absent class members' due process are protected. *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 846-47 (1999); *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940). When a court is asked to certify a case as a class action exclusively for purpose of settlement, to obtain jurisdiction over absent class members, the court need satisfy itself only that *some* claim, not every claim settled, meets all the requirements for class certification. Once all the parties purportedly within the class are properly before the court, and once they receive adequate notice of the terms of the settlement, class members are free to release claims that they might not be able to litigate on a classwide basis had they chosen not to settle. See *Matsushita Elec. Indus. Co., Ltd.* v. *Epstein*, 516 U.S. 367 (1996) (discussing preclusive effect of state court class action settlement that released class members' rights to pursue claims over which federal courts had exclusive jurisdiction). Indeed, it is common that defendants in class litigation insist that class members release *all* claims that they might have, whether asserted or not; defendants do not want to pay unless they are purchasing complete peace. *Montgomery* v. *Aetna Plywood, Inc.*, 231 F.3d 399, 405 (7th Cir. 2000) (settlement agreement that releases all claims "asserted and assertable" against defendants); *In re VMS Securities Litigation*, 21 F.3d

139, 141 (7th Cir. 1994) (settlement release encompassing claims not asserted in the class litigation).

When the parties entered into their settlement agreement, the plaintiffs had asserted a variety of legal theories, including their RICO theory, but also including claims under the Truth-In-Lending Act, state unfair and deceptive acts and practices statutes, theories of fiduciary duty breach, breach of contract, unjust enrichment and fraud. When the district judge approved the settlement, he concluded, as required by *Amchem*, that class treatment was appropriate because common issues predominated, but he never specified which claim or claims formed the basis of that ruling. Nothing in the decision suggests that he concluded that common issues predominated with respect to *all* of plaintiffs' asserted legal theories, and nothing specified that he had concluded that common issues predominated with respect to the RICO fraud claims. Nonetheless, the Seventh Circuit concluded that the defendants' effort to dispute that common issues predominate with respect to plaintiff's RICO fraud claim is "clearly inconsistent" with the position the defendants took during the settlement approval proceedings. *New Hampshire*, 532 U.S. at 750. Nothing in the record supports that conclusion, and no sound policy supports inferring it from the mere fact that the defendants sought approval of the settlement.

It has been widely assumed and accepted that a party settling class litigation may reserve the right, in the event a settlement is rejected, to dispute the propriety of class certification for litigation purposes. *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litig.*, 55 F.3d 768, 790 (3d Cir. 1995) (stating that defendants may "stipulate to class certification [for settlement purposes] without forfeiting *any* of their legal arguments against certification should the negotiations fail") (emphasis added); *Manual for Complex Litigation (Fourth)* § 21.612 at 313 (Fed. Judicial Ctr. 2004) (same); 4 A. Conte & H. Newberg, *Newberg on Class Actions* § 11:27, at 48 (4th ed. 2002)

(stating that settling defendant may dispute class certification "de novo" in the event certification is ultimately rejected). That rule reflects sound policy because it substantially supports the longstanding and strong public interest in the settlement of potentially costly and judicially burdensome class litigation. *Isby* v. *Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996); *In re General Motors Corp.*, 55 F.3d at 784; *Ransberg Electro-Coating Corp.* v. *Spiller & Spiller, Inc.*, 489 F.2d 974, 978 (7th Cir. 1973).

Class litigation is a high-risk endeavor, especially for defendants who face a potentially crushing financial burden in terms both of litigation costs and judgment, which as in this case, can be multiplied by the thousands of class members. *Szabo* v. *Bridgeport Machines, Inc.*, 249 F.3d 672, 675 (7th Cir. 2001). Since settlement is, by its nature, a compromise, it is never questioned that a defendant may choose to protect itself against the risk of a devastating financial judgment even when the defendant doubts that the plaintiff's claim has merit. There is no reason why a defendant should be unable to treat the question of class certification the same way it treats the question of its own liability.

The Seventh Circuit's ruling precludes this common sense outcome. In the Seventh Circuit, a defendant can no longer bargain over uncertainty with respect to class litigation. The defendant instead faces a stark choice: either *concede* forever that class treatment is appropriate (except with respect to manageability) as a condition of settling the case and obtaining peace and freedom from a potentially large financial judgment or preserve their right to dispute class certification and seek settlement only *after* the court has ruled on that debatable question. The decision below cavalierly dismissed the chilling effect on settlement of its ruling by noting the overwhelming pressure defendants have to settle class litigation. Pet. App. 11a-12a. This analysis, though, fails to appreciate how much more room there is for mutually agreeable compromise early in the litigation, before a

definitive ruling on class certification has been reached. The uncertainty regarding the propriety of class certification itself is often a substantial incentive for both parties to settle, beyond the uncertainty plaintiffs face regarding the legal viability of their claims on the merits. By placing a substantial additional cost on the defendants' freedom to compromise at that early stage in the litigation, the Seventh Circuit has created a severe disincentive to settle class litigation.

The fact that parties often wish to settle early in the litigation, and that judicial resources are conserved when they do so, also highlights the flaw in the Seventh Circuit's decision to deem arguments against certification (here, collateral estoppel based on the *Buford* decision) waived if not presented to a district court considering whether to certify a class for settlement purposes. Pet. App. 11a. The Seventh Circuit never explained why a defendant submitting a settlement class to the court for its consideration should be put to the task of developing and cataloging every conceivable argument it might have against class certification, or else be deemed to have waived it. It is difficult to conceive what public policy would be served by such a rule. Rules of waiver exist primarily to ensure that a party is not unfairly surprised and left without adequate opportunity to respond to the opposing party's views, as well as to ensure that the court has the opportunity to correct any errors before its decision is reviewed. *Fenton* v. *Freedman*, 748 F.2d 1358, 1360 (9th Cir. 1984). Neither purpose is implicated here.

II. THIS COURT SHOULD RESOLVE THE DISPUTE AMONG THE CIRCUITS REGARDING THE PROPER TREATMENT, FOR CLASS CERTIFICATION PURPOSES, OF A RICO FRAUD PLAINTIFF'S OBLIGATION TO PROVE RELIANCE ON AN INDIVIDUAL BASIS.

The Seventh Circuit, in the opinion below, accepted that no class member may recover under the RICO fraud cause of

action unless he or she can establish that he or she relied on an allegedly false statement. Pet. App. 10a. The Seventh Circuit also acknowledged that this essential element of a RICO fraud claim has led the Fifth Circuit to apply "a presumption against class action certification in RICO cases." *Id.* (citing *Sandwich Chef*, 319 F.3d at 219). Though the Seventh Circuit did not acknowledge it, the Petition ably demonstrates that other circuits give substantial weight to the requirement that RICO fraud plaintiffs will be required individually to prove reliance when considering whether to certify such claims as class actions. Pet. 17-18 (citing *Poulos* v. *Caesars World, Inc.*, 379 F.3d 654, 664-66 (9th Cir. 2004)); *Sikes* v. *Teleline, Inc.*, 281 F.3d 1350, 1361-64 (11th Cir. 2002); *Klay* v. *Humana, Inc.*, 382 F.3d 1241, 1259-60 (11th Cir. 2004), *petition for cert. filed*, 73 USLW 3260 (Oct. 10, 2004) (No. 04-522); *Gunnells* v. *Healthplan Servs., Inc.*, 348 F.3d 417, 436-37 (4th Cir. 2003), *cert. denied*, 124 S. Ct. 2837 (2004); *Broussard* v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 342-43 (4th Cir. 1998). The Seventh Circuit's approach adopted in this case represents a third view: the need to prove reliance on an individual basis is of no moment for a district court considering whether to certify a RICO class because reliance goes only to remedy, not to liability. Pet. App. 7a, 10a. This Court should clarify these varying approaches—which span nearly the full spectrum of the possible, from presumptively disqualifying all the way to utterly irrelevant—and reject the Seventh Circuit's novel and indefensible view.

To be sure, it may be appropriate to certify a case as a class action when liability can be determined on a classwide basis, even though individual proceedings will be necessary to calculate each class members' damages. The Advisory Committee Notes accompanying the 1966 amendement to Rule 23 make this clear: the predominance of common issues is not undermined even when a "separate determination of the damages suffered by individuals within the class" will be

required after liability is determined. So do various decisions from the Courts of Appeals. See, *e.g.*, *Klay*, 382 F.3d at 1259-60; *Bell Atlantic Corp.* v. *AT&T Corp.*, 339 F.3d 294, 306 n.16 (5th Cir. 2003); *Lienhart* v. *Dryvit Systems, Inc.*, 255 F.3d 138, 147 (4th Cir. 2001). But it is not true that individualized issues of reliance are properly treated just like individualized proof necessary to calculate damages. As the Petition explains, the Seventh Circuit identified no case so holding. Pet. 20-21 (explaining holdings of *Exxon Co.* v. *Sofec, Inc.*, 54 F.3d 570 (9th Cir. 1995) and *In re Bendectin Litig.*, 857 F.2d 290 (6th Cir. 1988)). The Advisory Committee Notes accompaning the 1966 amendment to Rule 23 recognizes that reliance is different from damages, too: a fraud case may be "unsuited for treatment as a class action if there was material variation ... in the kinds or degrees of reliance."

The distinction between damages issues (in appropriate cases severable from the predominance analysis) and elements of a claim that determine liability is critical if the predominance inquiry is to have any meaning at all. As a logical matter, it is always possible to chop up a plaintiff's claim into its various elements, and to focus on *some* issue that is common to all class members. Rule 23(a), of course, requires that there be *some* issue common to all class members as a prerequisite to class treatment. But Rule 23(b)(3)'s predominance requirement is more demanding. The common issues must be so substantially overriding that they justify allowing a single representative to adjudicate the claims of numerous absent parties. Given the realities of modern class litigation, and the rarity of parties choosing to opt out, it is critical that the predominance requirement provide a robust protection of the interests of absent class members lest they be bound by parties who share only an insubstantial legal connection to them. *Amchem Prods., Inc.*, 521 U.S. at 623.

The Seventh Circuit has chosen to ignore the fact that each class member must individually demonstrate reliance—a substantial difference between each class members' claims—and nonetheless bind absent class members to the fate of a stranger's litigating choices. Whether an individual class member actually relied on a false statement cannot be dismissed as merely a matter of remedy. It goes directly to the question whether that individual was wronged at all. Even assuming, for argument's sake, that Respondent Carnegie could prove that the Petitioner and the Beneficial Respondents made false statements, unless someone relied on them, they were statements offered into the air, utterly without significance. If those statements did not affect the conduct of any particular class member, there is no reason why that class member should care at all that the statement was even made. That is why this Court has acknowledged that, in fraud cases, when individualized proof of reliance is required, class treatment is inappropriate. *Basic Inc.*, v. *Levinson*, 485 U.S. 224, 242 (1988) (plurality opinion). That is also why the Fifth Circuit, in *Sandwich Chef*, 319 F.3d at 219, held that "cases that involve individual reliance fail the predominance test." Finally, that is why no other court of appeals has considered the reliance element of a RICO fraud claim to be merely a damages issue, instead of a liability issue.

There is no economy to be gained if after the completion of the proceedings on common issues, a full trial still remains to prove whether any class member can demonstrate that he or she was even wronged. The Seventh Circuit appeared to acknowledge that its decision would not produce any judicial economy. When it contemplated how the case would be litigated going forward, it acknowledged that the district court would be required to devise "imaginative solutions" to deal with the need to allow each class member to demonstrate actual reliance. Pet. App. 7a. The court's opinion offers little guidance short of a warrant to conduct numerous individual

mini-trials, which effectively concedes that no economies are gained here. *Id.* Worse, the court seemed to wish the problem away by expressing the hope that upon completion of the proceedings common to the class, "a global settlement along the lines originally negotiated ... will be a natural and appropriate sequel." *Id.* Put simply, the Seventh Circuit concluded that common issues predominate even though it can foresee no judicial economy following from class treatment unless the parties agree to settle before the thousands of individual mini-trials become necessary. This Court's review is warranted in light of the broad rejection throughout the other courts of appeals of this approach.

* * * *

The Seventh Circuit has done serious violence to the proper administration of class actions under Rule 23. It has imposed significant and needless obstacles to reasonable early settlements of putative class actions by estopping the defendant from challenging later efforts at certification if the first settlement fails. It then eliminated the predominance requirement in Rule 23(b)(3) in all litigation involving fraud claims. These are profound rulings that conflict with other courts of appeals and common sense. They warrant this Court's review.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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